(1)

95-910

No. 95-

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DARRYL COVINGTON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CHARLES F.C. RUFF,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

*DONNA M. MURASKY,
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square
Sixth Floor South
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3303

**Counsel of Record*

36 pp

QUESTION PRESENTED

Whether private, for-profit attorneys, who prevail in federal fee-shifting litigation, may be awarded hourly rates which exceed the rates they have ever charged their fee-paying clients and the rates charged by comparable counsel in similar litigation even though *Blum v. Stenson*, 465 U.S. 886 (1984), and *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992), require that hourly rates awarded under federal fee-shifting statutes reflect market rates and bar contingency enhancements.

PARTIES

This petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit in an appeal in which three cases in the United States District Court for the District of Columbia were consolidated: *Covington v. District of Columbia*, Civil Action No. 87-2658; *Sexcius v. District of Columbia*, Civil Action No. 88-2104; and *Galloway v. The Superior Court, Civil Action No. 91-0644*. The parties in this Court are as follows:

Covington. Petitioners, who were the original defendants below, are: District of Columbia, Raymond Barnes, James Bryant, Philip D. Bullock, Leslie C. Childs, David P. Dalton, Herbert H. King, Robert Newkirk, Mario L. Randle, George M. Cutler, Roland J. Jackson, Reginald Nickens, Frederick Shuler, Lavel D. Johnson, Dana Marshall, Luay A. Sese-Khalid, and Rita Goodall. Respondents, who were plaintiffs below, are: Darryl Covington, Tracy Dew-Bey, David Edwards, Lee Roy Ferguson, Raymond Gant, Charles Harris, Donald Hunt, Larry Lee, Leo Wright, and Charles Barber.

Sexcius. Petitioners, who were defendants below, are the District of Columbia; its Mayor, Marion Barry, as successor to Sharon Pratt Kelly; the District of Columbia Board of Education and its Superintendent, Dr. Andrew E. Jenkins III, as successor to Dr. Franklin L. Smith; Lucille E. Christian; and Mary B. Hendrick. Respondents, who were plaintiffs below, are Sheriel L. Sexcius and William F. Edmead.

Galloway. Petitioners, who were defendants below, are the District of Columbia Courts; the Superior Court of the District of Columbia; Ulysses B. Hammond, in his official capacity; the Board of Judges of the District of Columbia; Eugene N. Hamilton, as successor to Fred B. Ugast; Ray Wynn, in his official capacity; and the District of Columbia. Respondent, who was the plaintiff below, is Donald Galloway. The United States appeared in the United States District Court as *amicus curiae*.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES ii
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
I. INTRODUCTION. 2
II. THE LAFFEY MATRIX. 5
III. THE DISTRICT COURTS' DECISIONS. 7
A. *Their Common Threads.* 7
B. *Covington* 9
C. *Sexcius.* 13
D. *Galloway* 13
IV. THE COURT OF APPEALS. 14
REASONS FOR GRANTING THE WRIT 17
I. THE DECISION OF THE PANEL MAJORITY IS IN CONFLICT WITH THE DECISIONS OF THIS COURT. . . 18
A. THIS COURT'S DECISIONS. 18
B. THE PANEL MAJORITY'S DECISION. 19
II. THE PANEL MAJORITY'S DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS. 23
CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Barrow v. Falck, 977 F.2d 1100 (7th Cir. 1992) 22,25
Barrow v. Falck, 11 F.3d 729 (7th Cir. 1993) 26
Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 27
Blum v. Stenson, 465 U.S. 886 (1984) . . . . . *passim*
Casey v. Cabool, Missouri, 12 F.3d 799 (8th Cir. 1993), *cert. denied* 115 S. Ct. 325 (1994) 27
Chambless v. Masters, Mates & Pilots Pension Plan, 885 F.2d 1053 (2d Cir. 1989), *cert. denied*, 496 U.S. 905 (1990) 28
City of Burlington v. Dague, 112 S. Ct. 2638 (1992) . . *passim*
Coulter v. Tennessee, 805 F.2d 146, (6th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987)) 24
Davis v. San Francisco, 976 F.2d 1536 (9th Cir. 1992) . . 22,28
Goos v. National Ass'n of Realtors, 997 F.2d 1565 (D.C. Cir. 1993) 4,29
Gusman v. Unisys Corp., 986 F.2d 1146 (7th Cir. 1993) . . . 27
Hall v. Ochs, 817 F.2d 920 (1st Cir. 1987) 24
Islamic Center of Mississippi, Inc. v. Starkville, Mississippi, 876 F.2d 465 (5th Cir. 1989) 29
Kattan v. District of Columbia, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994) 29
King v. Palmer, 906 F.2d 762 (D.C.Cir.1990), *rev'd*, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *cert. denied sub nom., King v. Ridley*, 112 S. Ct. 3054 (1992) 19,21
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *cert. denied sub nom., King v. Ridley*, 112 S. Ct. 3054 (1992). . . . . *passim*
Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983), *rev'd*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985) 5,6
Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985) 24

Lightfoot v. Walker, 826 F.2d 516 (7th Cir. 1987), ... 23
Mayson v. Pierce, 806 F.2d 1556 (11th Cir. 1987)
(*per curiam*) 23
McKenzie v. Kennickell, 875 F.2d 330 (D.C. Cir. 1989) 8
National Ass'n of Concerned Veterans v. Secretary of Defense,
675 F.2d 1319 (D.C. Cir. 1982) 16,20
Pennsylvania v. Delaware Valley Citizens' Council
for Clean Air, 483 U.S. 711 (1987) 24
Rum Creek Coal Sales, Inc. v. Caperton,
31 F.3d 169 (4th Cir. 1994) 27
Save Our Cumberland Mountains, Inc. v. Hodel,
826 F.2d 43 (D.C. Cir. 1987), *rev'd*,
857 F.2d 1516 (D.C. Cir. 1988) (*en banc*) 23
Save Our Cumberland Mountains, Inc. v. Hodel,
857 F.2d 1516 (D.C. Cir. 1988) (*en banc*) . . . . . *passim*
Shakopee Mdewakanton Sioux Community v. Prior Lake,
771 F.2d 1153 (8th Cir. 1985), *cert. denied*,
475 U.S. 1011 (1986)) 23
Student Public Interest Research Group v. AT & T Bell
Laboratories, 842 F.2d 1436 (3d Cir. 1988) 23,24,28
U.S. Dep't of Labor v. Triplett, 494 U.S. 715 (1990) 21
Webb v. Maldonado, 484 U.S. 990 (1987) 24
White v. Richmond, 713 F.2d 458 (9th Cir. 1983) 24,28

STATUTES

28 U.S.C. § 1254(1). 2
28 U.S.C. § 1291 1
42 U.S.C. § 1988 2,9
Individuals with Disabilities Education Act,
20 U.S.C. § 1400 *et seq.* 27
Rehabilitation Act of 1973, 29 U.S.C. § 794a(b). 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

DISTRICT OF COLUMBIA, *et al.*,
Petitioners,

v.

DARRYL COVINGTON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

The District of Columbia and several of its officials and employees petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1-27), in an appeal in which the court consolidated three cases, is reported at 57 F.3d 1101. Two of the three decisions of the United States District Court for the District of Columbia it reviewed are reported: *Covington v. District of Columbia*, 839 F. Supp. 894 (D.D.C. 1993) (App. 28-51), and *Sexcius v. District of Columbia*, 839 F. Supp. 919 (D.D.C. 1993) (App. 52-75). The third, *Galloway v. The Superior Court for the District of Columbia*, Civil Action No. 91-0644 (D.D.C. Apr. 21, 1994) (App. 76-81), is not reported.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

JURISDICTION

The D.C. Circuit entered its original judgment on June 23, 1995. The District of Columbia filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion were denied on September 12, 1995. App. 82 & 83. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1988 and the Rehabilitation Act of 1973, 29 U.S.C. § 794a(b). 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of section[] 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

Section 794a(b) of the Rehabilitation Act provides in pertinent part:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

I. INTRODUCTION.

The cases before this Court all involve fee awards to private, for-profit practitioners under federal fee-shifting statutes. In each of the cases, counsel sought, and received, fees at hourly rates in excess, and usually substantially in excess, of the rates charged to their clients in these cases and of any rate they had ever commanded in the marketplace. They received these rates even though this Court has ruled that attorneys must be paid at market rates when

they prevail in federal fee-shifting litigation and that market-based fees may not be enhanced because a case has been taken on a contingent basis in whole or in part.

In *Blum v. Stenson*, 465 U.S. 886 (1984), this Court ruled that not-for-profit legal organizations which successfully represent clients under federal fee-shifting statutes must be compensated at the prevailing market rates for their services. At the same time, however, this Court recognized that "there is no such thing as a prevailing market rate for the service of lawyers in a particular community." *Id.* at 895 n.11. On the contrary, "[t]he type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively -- even within a law firm," and "[a]ccordingly, the hourly rates of lawyers in private practice also vary widely." *Id.* This Court also placed on fee applicants the burden of demonstrating the market rate or rates to which their counsel are entitled.

In *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir. 1988) (*en banc*) ("*SOCM*"), the D.C. Circuit extended *Blum* to attorneys who practice for profit but who take public-interest, or federal fee-shifting, cases on a reduced-fee basis. It ruled that such attorneys should be paid "at rates commensurate with prevailing community standards of attorneys of *like expertise* doing the *same sort of work* in the *same area*." *Id.* at 1521 (emphasis added). In so ruling, the court expressly disclaimed that it intended to adopt a rule "that all attorneys be remunerated at the same rate, regardless of their competence, experience, and marketability," and stated that it intended only "to provide that their experience, competence, and marketability will be reflected in the rate at which they are in fact remunerated." *Id.* at 1521 n.4.

Four years later, this Court ruled that contingency enhancements are not available under federal fee-shifting statutes and that, in the absence of extraordinary circumstances, a fee award must be limited to a lodestar award -- an award calculated by multiplying the reasonable number of hours spent on a case by a reasonable hourly rate. *City of Burlington v. Dague*, 112 S. Ct. 2638 (1992).

With the demise of contingency enhancements, counsel for prevailing plaintiffs in the District of Columbia routinely began to argue that the hourly rates which they charged their fee-paying clients, and which they previously had sought in their lodestar awards, were below-market and thus not reasonable. *See, e.g., Goos v. National Ass'n of Realtors*, 997 F.2d 1565, 1568-69 (D.C. Cir. 1993) (abandoning argument for a contingency enhancement in light of *Dague* and urging for the first time on appeal that the hourly rate the attorney ordinarily charged his clients and sought at the trial level was a below-market rate).

In the three cases before this Court, the highest hourly rates ever charged by lead counsel were $150.00, $187.50, and $200.00, yet each requested, and received, $260.00 per hour. The courts below accepted counsels' representations that even the highest hourly rates they agreed to accept from paying clients in the marketplace, whether in fee-shifting or non-fee-shifting cases, were below-market rates. The principal basis for these awards is a pre-*Blum* attorney-fee matrix, known as the *Laffey* matrix.

These awards are fundamentally flawed. First, the courts below have created presumptive market rates based on data for the entire District of Columbia Bar -- the *Laffey* matrix -- that would not even support an inference that these rates are reasonable rates for the attorneys here. In the process, the courts below have impermissibly shifted the burden of proof for establishing reasonable hourly rates from fee applicants to defendants. Second, in awarding hourly rates that exceed the rates charged both by prevailing counsel to their fee-paying clients here and in other cases, and by counsel with comparable experience, skill, and reputation in similar cases, the courts below have approved above-market hourly rates. Such rates are not authorized by *Blum* and are indistinguishable from the contingency enhancements condemned in *Dague*. Not surprisingly, the panel majority's decision here is in conflict with other Circuits interpreting *Blum* and *Dague*. Review is necessary to resolve the D.C. Circuit's conflicts with the decisions of this Court and other Circuits, as well as to resolve other conflicts among the Circuits concerning the meaning of *Blum*.

II. THE *LAFFEY* MATRIX.

The key to understanding the decisions below is the *Laffey* matrix. The *Laffey* matrix was developed in the early 1980's in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), to determine what hourly rates would be reasonable for the successful plaintiffs' counsel in that case. Three aspects of the matrix are important here -- its structure, purpose, and validity.

Structure. The *Laffey* matrix established hourly rates for attorneys based solely on the number of years they have been in practice; divided them into five experience groups; and assigned to each group a *single* hourly rate as the market rate. *Id.* at 371. The *Laffey* matrix has been updated. Under the latest figures in the record (App. 39-40), those for 1992-1993, the hourly rates assigned to each experience group are as follows:

Years of Experience	*Rate*
20+ - very experienced federal litigators	$300.00
11 to 19 - experienced federal litigators	$260.00
8 to 10 - experienced litigators	$225.00
4 to 7 - senior associates	$175.00
1 to 3 - junior associates	$130.00

Purpose. The *Laffey* matrix was developed to help determine reasonable hourly rates for several attorneys of superior skill and expertise who had litigated to a very successful conclusion a complex Title VII class action. In *Laffey*, 25 affidavits were submitted on behalf of plaintiffs' counsel by "an impressive array of legal personages" attesting "to the actual rates charged by lawyers at some of the most prestigious law firms in Washington, D.C.; . . . the complexity and significance of *Laffey*; and the experience, expertise and sterling reputation of Plaintiffs' counsel." 572 F. Supp. at 367 & 367 n.24. Thus, the assumptions built into the matrix are clear: it was designed to reflect rates paid to attorneys of "extraordinary experience and expertise" engaged in very com-

plex and successful litigation. *Id.* at 374. Indeed, in *Laffey* itself, the district court recognized the special nature of the matrix and refused to apply it mechanically. Thus, it reduced the "generous" *Laffey*-matrix rates by *one-third* in awarding fees to one attorney because he did not have the superior skills and expertise of lead counsel, even though it expressed no dissatisfaction with his performance. *Id.* at 374; *see id.* at 375 n.37.

Validity. The assumptions underlying the matrix were not litigated. The defendant in *Laffey* did not dispute that plaintiffs' lead counsel was "'one of the premier employment discrimination firms in the country'" or that the matrix was "an accurate depiction of the prevailing market rates for lawyers of comparable skill and ability who represent defendants in complex Title VII cases." *Id.* at 372 (internal quotations omitted). As a result, the validity of *Laffey's* sample of rates and the methodology used to select the *Laffey*-matrix rates was not proven, even for the limited purpose for which the matrix was devised.

There is only one other important matter to be noted about the *Laffey* matrix -- it has been "updated" in two different ways. One "update" has been based on information provided from time to time by various members of the private bar in the District of Columbia. App. 7. The other "update" has been based on the Consumer Price Index by the U.S. Attorney's Office in the District and is used to establish a rate ceiling in settlement negotiations. App. 8 n.14.[1]

---

[1]James R. Layton, an Assistant U.S. Attorney for the District of Columbia, who prepared that matrix, explained that the rates in the matrix are often higher than those charged by attorneys to their clients and that the office uses the matrix as a cap:

> I . . . have compared the rates given in the matrix to rates given in affidavits submitted by attorneys in support of fee applications as those applied by attorneys to their paying clients, and have determined that most, although not all, such rates are at or below the rate shown in the matrix.

(continued...)

III. The District Courts' Decisions.

A. *Their Common Threads.*

In awarding fees in the cases before this Court, the district courts adopted the principle that all attorneys who are engaged in a for-profit practice, but who charge hourly rates in "public-interest" (*i.e.*, fee-shifting) cases that are less than *Laffey*-matrix rates, are charging below-market rates and must be compensated at *Laffey*-matrix rates. According to these courts, plaintiffs met their burden of establishing reasonable hourly rates by introducing (1) the *Laffey* matrix, as updated by the private bar, and (2) the U.S. Attorney's Office *Laffey*-based matrix. The courts so ruled even though they recognized the crudeness of these matrices. App. 36, 60, & 78 n.1.

These courts found unpersuasive the District's evidence, drawn mostly from federal court cases against it. This evidence showed that seven experienced (11-19 years) or very experienced (20+ years) plaintiffs' attorneys with practices similar to lead counsel here were charging hourly rates of $125.00 to $150.00 to their fee-paying clients. App. 36.[2] The District's evidence also included

---

[1](...continued)

> . . . We do not, in settling cases, allow counsel to recover at rates in excess of those shown in the matrix.

J.A. (II)87 (emphasis added). References to "J.A." in this Petition are references to the Joint Appendix filed in the court of appeals in this case.

[2]This evidence, showing the actual rates charged by counsel in cases similar to those before the Court and the applicable *Laffey*-matrix rates, may be illustrated as follows:

(continued...)

telling affidavits filed by two of the key players in the contingency-enhancement litigation in the D.C. Circuit, Robert Adler and Joel Bennett. Neither of them ever suggested during that litigation that the hourly rate they were charging clients, and seeking in their fee applications, was a reduced, or below-market, rate, even though their then-current rate of $135.00 was far below the then-applicable *Laffey* rates of $200.00-$210.00.

On the contrary, Mr. Bennett's 1987 affidavit in *McKenzie v. Kennickell*, 875 F.2d 330 (D.C. Cir. 1989), stated:

> *My current minimum hourly rate in all cases, including employment discrimination, is $135.00 per hour. . . . At one time I did accept employment discrimination clients based on a reduced rate* with the intent of recovering court awarded fees based on my full rate if I prevailed, *but I stopped this practice in 1981.*

---

[2](...continued)

Year	*Attorney*	*Experience (Years)*	*Hourly Rate*	*Laffey Rate*
1987	R. A. Adler	19	$135.00	$200.00/210.00
1987	J. P. Bennett	14+	$135.00	$200.00/210.00
1990	R. L. Bell	10+	$150.00	$230.00/240.00
1991	G. H. Simpson	18	$125.00	$240.00/250.00
1992	T. F. Fay	25	$144.00	$290.00/300.00
1992	J. J. McCarthy	13	$150.00	$250.00/260.00
1992	C. S. Steel	15	$150.00	$250.00/260.00
1992	J. P. Hart	20	$150.00	$290.00/300.00
1992	J. Harvill	18	$150.00	$250.00/260.00

Two figures are shown in the last column because the *Laffey* matrix is set up on a June 1 to May 31 time frame. Therefore, the rate for any experience group differs depending on whether fees are sought in the first or the second half of any calendar year.

J.A. (I)232 (emphasis added). Mr. Adler's fee application in *King v. Palmer*[3] also confirmed that an hourly rate of $135.00 for experienced attorneys in employment discrimination cases in 1987 was a market rate. Mr. Adler stated that this rate was the rate "charged to all clients of the firm who were billed on an hourly basis" and the rate "regularly charged by counsel for performing similar work in private representation." J.A. (I)269. Furthermore, Mr. Adler stated that this rate fell "*within the rates charged by other firms for similar work in the same community.*" J.A. (I)269 (emphasis added) (internal quotation marks omitted). In other words, in pre-*Dague* fee litigation, experienced counsel in the District doing the same kind of work as counsel here did not regard their below-*Laffey*-matrix rates as reduced, or below-market, rates.

B. *Covington.*[4]

This was a prisoner-rights case taken on a wholly contingent-fee basis in which a fee award was sought under 42 U.S.C. § 1988. Lead counsel were Daniel M. Schember and Michael J. Gaffney of Gaffney & Schember, P.C., a firm which has a "general litigation practice," including "various federal administrative proceedings." J.A.(I)159. In support of their fee request, counsel submitted a modestly detailed application. It included declarations by Messrs. Schember and Gaffney in which they averred that they have concentrated their practices as plaintiffs' lawyers in employment, civil rights, and similar cases.

Importantly, their declarations demonstrated that they have responded to market conditions by charging rates below those charged by large firms and by maintaining fairly constant rates over

---

[3]950 F.2d 771 (D.C. Cir. 1991) (*en banc*), *cert. denied sub nom., King v. Ridley*, 112 S. Ct. 3054 (1992).

[4]The District limits its factual presentation to lead counsel in each of these cases. However, the *Laffey* matrix was used to set rates for all other counsel and paralegals except in those circumstances in which *Laffey*-matrix rates inexplicably were not sought.

the years. Thus, Mr. Gaffney, a 1975 law school graduate, charged a range of hourly rates as late as 1992 as follows: $50.00, $100.00, $120.00, 125.00, $140.00, and $150.00; and Mr. Schember, a 1974 law school graduate, charged rates of $125.00 and $150.00 in 1992 (and a range of lower rates in earlier years). J.A. (I)170-71. From 1986 to June, 1990, their top hourly rate was $125.00; and from June, 1990, to the time they filed their fee application in December, 1992, their top hourly rate was $150.00. J.A. (I)171.

Despite their own evidence of the rates they can command in the marketplace, these attorneys requested that the District be required to pay them at *Laffey*-matrix hourly rates, or $260.00. App. 39-40. The reason for seeking greater remuneration from the District than they charged their clients was summarized by Mr. Schember as follows:

> . . . [O]ur firm has historically been, and continues to be, a quasi public interest firm whose attorneys practice privately and for profit, but at below-market rates reflecting non-economic goals. We have customarily charged below the prevailing market rate to accommodate our clients' limited means and the importance of their cases.

J.A. (I)159.

In granting their request, the Honorable Royce C. Lamberth stated that "[t]he most difficult issue . . . is establishing the reasonable hourly rate." App. 31; see also App. 39. He explained that his task was to "determine the 'prevailing market rates in the relevant community,' and award counsel that as the reasonable hourly rate" because, "[i]n the D.C. Circuit, this . . . method . . . is . . . used to determine the attorney's fees owed to 'privately practicing but public interest motivated attorneys who intentionally charge their poorer clients reduced rates.'" App. 32. He concluded that the firm was entitled to *Laffey*-matrix rates because *the District of Columbia* had failed to "produce[] enough evidence that plaintiffs' counsels' ordinary billing rates -- about $150 per hour -- are not below market value." App. 32.

His decision turned on two inquiries: the definition of the relevant market and the determination of the prevailing hourly rate in that market. The District urged that the relevant market be defined as attorneys who file civil rights, employment discrimination, and similar suits, while plaintiffs urged a market composed of attorneys who are involved in complex federal litigation. App. 33. Judge Lamberth analyzed the issue as follows:

> *[The District's] position may be plausible*. . . . [T]he legislative history of § 1988 and subsequent Supreme Court and District of Columbia circuit caselaw construing attorney's fee statutes make clear that in resolving any particular attorney's fee question under § 1988 (including this sub-market question), *courts must aim to award attorney's fees that mirror what counsel would earn in the market.* If the market would provide different sub-markets of lawyers different rates, courts properly aiming to mirror the market would award lawyers in each sub-market the fees that their particular services command in the marketplace.

App. 33-34 (emphasis added) (footnotes omitted).

Judge Lamberth nevertheless accepted "plaintiffs' *theory* that the relevant market should be very broadly defined . . .." App. 38-39 (emphasis added). *The District* had failed to "produce[] enough evidence . . . that the prevailing rate in the sub-market . . . is . . . lower than the rate prevailing in the broader legal market." App. 35. By contrast, plaintiffs had met their burden of defining the relevant market by introducing the two updated *Laffey* matrices. App. 35-36; see also App. 39-40. Judge Lamberth so ruled even though he recognized that the District's criticisms of these matrices -- that they "*represent[] only a small percentage of the District of Columbia's Bar, and . . . omit[] the 'lower end of the market' of legal services -- may have merit* . . .." App. 36 (emphasis added).

Judge Lamberth explained:

> For their own part, *defendants have not presented persuasive evidence* that the fees earned by plaintiffs' lawyers in the sub-market of civil rights, employment, and discrimination litigation are lower than the fees earned in the broader market of complicated federal litigation. . . . For example, . . . [their] affidavit cites only seven instances in which lawyers with 10-20 years of experience charged about $150 per hour in representing plaintiffs in civil rights, employment, or discrimination matters. . . . These seven instances look suspiciously representative of only the lower end of the sub-market. . . . *Defendants have failed to proffer evidence of the high end, as well as the low end, of the range of rates commanded by very experienced counsel in their proposed sub-market.*

App. 36-37 (emphasis added).

Judge Lamberth also set forth the burden that "parties opposing fee awards" must bear in the future in order to prevail:

> *A statistically reliable, well-documented, and extensive survey of the rates clients pay for a certain sub-market of legal services* would be powerfully persuasive. Such a survey would collect the rates of a statistically significant number of lawyers or firms within a legal sub-market, convincing the court that the survey's scope is broad enough to reflect the market faithfully. Such a survey would be sufficiently documented with supporting affidavits, assuring the court of the accuracy of the survey's data. Lastly, such a survey would encompass both the high rates that large, prestigious law firms in the area command for their work in the sub-market and the lower rates commanded by others for their work in the sub-market.

App. 37-38 (emphasis in original).

C. *Sexcius*.

Counsel in this first amendment/employment case were two experienced attorneys, Francine K. Weiss and Edith Barnett, who, pursuant to a retainer agreement, were paid $100.00 per hour for their time. Despite that fact, they sought a hourly rate of $260.00 from the District of Columbia. App. 54.

Their fee application was more meager than that in *Covington*. They did not initially disclose their billing rates for fee-paying clients, but simply requested *Laffey*-matrix rates. Eventually they filed declarations stating that they "do not have 'established billing rates'" and that, "because counsel's clients are unable to pay the rates prevailing in the community for complex federal litigation and are frequently unemployed, our rates vary from a pure contingent fee to $187.50 per hour." J.A. (II)71; see also J.A. (II)74.

The Honorable Royce C. Lamberth awarded *Laffey*-matrix rates in a decision that tracks his decision in *Covington*. Among other matters, he rejected the argument that the rate counsel charged in this case should be regarded as the market rate on the grounds that the D.C. Circuit in *SOCM* had ruled that "*[c]ounsels' usual billing rate is . . not directly relevant*" in determining the market rate for an attorney who takes a case on a reduced-fee basis. App. 56 n.4 (emphasis added).

D. *Galloway*.

In this case, challenging the exclusion of a blind attorney from jury service, plaintiff's lead counsel, Vicki G. Golden, sought *Laffey*-matrix rates in a case in which she represented the plaintiff on a contingent-fee basis. She initially did not provide any information about her billing practices although she is a partner in a small District of Columbia firm. Subsequently, in language identical to that of counsel in *Sexcius*, she averred that, "[b]ecause my clients are unable to pay the rates prevailing in the community for complex federal litigation and are frequently unemployed, my rates vary from

[a] pure contingent fee to $200 per hour, and I rely to a great extent on court-awarded fees for my compensation." J.A. (III)50-51.

The Honorable Joyce Hens Green acknowledged that Ms. Golden was seeking fees at an hourly rate she "has never earned . . . in her primarily employment discrimination private practice." App. 77. She ruled, however, that Ms. Golden was entitled to be compensated at "the prevailing market rate." App. 77. She explained:

> Ms. Golden is exactly the type of private attorney who charges reduced rates to clients due to non-economic goals discussed in *SOCM*. As such, *although in other cases the attorney's 'usual billing rate' may be of great assistance to the determination of the prevailing market rate, that is not the case here.*

App. 78 (emphasis added).

At the same time, however, Judge Green stated that she was "not completely satisfied by the *Laffey* matrix" because, for example, it "does not differentiate between an attorney with twelve years of experience and one with eighteen years." App. 78 & 78 n.1. Nevertheless, she held that the *Laffey* matrix "*provide[s] the most credible evidence available of rates for this market*" and that the District's "*examples of what civil rights attorneys charge . . . is insufficient to undercut . . . the Laffey matrix.*" App. 78 & 79 (emphasis added).

As a result, Judge Green, awarded fees to Ms. Golden at *Laffey*-matrix rates: $250.00 per hour for her work in 1992 and $260.00 per hour for her work in 1993.

IV. The Court of Appeals.

A divided panel of the D.C. Circuit affirmed the decisions of the district courts in all three cases. The decision of the panel majority (Edwards, C.J., & Wald, J,) is principally devoted to an

unusually detailed discussion of the merits of the cases, the hourly-rate evidence, and recitation of the abuse-of-discretion standard. App. 1-21. The panel majority affirmed the decisions setting hourly rates based on the updated *Laffey* matrices even though it too acknowledged that these matrices were flawed:

> Although fee matrices are somewhat crude -- the *Laffey* matrix, for example, lumps attorneys with four to seven years of experience in the same category; attorneys with eleven to nineteen also share the same hourly rate -- *the matrices do provide a useful starting point. To supplement any matrix that has been offered, plaintiffs may also provide* surveys to update the matrix; *affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases*; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases.

App. 16 (emphasis added).

Judge Henderson dissented. App. 22-27. In her view, plaintiffs' counsel had been awarded "premium hourly rates" despite the fact that "none of the plaintiffs has demonstrated . . . that the rates awarded prevail for the type of work performed or that the rates their lawyers have historically been able to secure from paying clients are not determinative of 'a reasonable hourly rate.'" App. 22, quoting *Blum v. Stenson*, *supra*, 465 U.S. at 888.

Furthermore, she pointed out that the majority failed to follow Circuit precedent placing the burden of proof on fee applicants. First, although the court previously had ruled that "'[a]n applicant is required to provide *specific evidence* of the prevailing community rate *for the type of work for which he seeks an award*,'" the fee applicants here had "chiefly rel[ied] on adjusted versions of the fee matrix developed more than ten years ago in *Laffey*," which cannot constitute such evidence, "where, as here, the litigation is of a

discrete type that appears to generate its own range of rates." App. 22-23 (internal quotation marks omitted) (emphasis in original).

Second, the district courts had mistakenly placed "the burden of proof on the *District*, not the applicants" and, "[b]ecause *the applicants* have failed to submit evidence that carries their burden . . ., the fee awards here are . . . based on a clear misapplication of legal principles requiring reversal." App. 24-25 (internal quotation marks omitted) (emphasis in original).

Third, at least in *Sexcius* and *Galloway*, "the district court did not give full effect to our precedent requiring it to consider the rates customarily charged by counsel to their paying clients for whom they have *not* reduced their rates in the public interest." App. 25 (emphasis in original). The D.C. Circuit previously had held that "'*the actual rate . . . [an] applicant's counsel can command in the market is itself highly relevant proof of the prevailing community rate.*" App. 26 (emphasis supplied by Judge Henderson), quoting *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982).

In short, Judge Henderson "dispute[d] . . . that a lawyer's billing history can be disregarded in favor of a rate that he has *never* commanded." App. 26 n.7 (emphasis in original). And, she also recognized that, despite the extensive factual discussion in the panel majority's decision, it had endorsed a rule, legislative in nature, for determining hourly rates in federal fee-shifting cases. From now on, attorneys who charge less than the premium rates set forth in the *Laffey* matrix must simply set forth that fact and aver that they charge lower rates because they are public-spirited. They are then entitled to the higher *Laffey*-matrix rates. The *Laffey* matrices are, therefore, not merely the starting point, but the dispositive point.

A divided D.C. Circuit denied rehearing *en banc*. App. 83-84. Judges Henderson and Williams would have granted rehearing.[5]

---

[5]Judge Tatel did not participate.

Reasons For Granting The Writ

A divided D.C. Circuit has created a presumption that prevailing counsel in federal fee-shifting litigation should be paid, not at the rates they charge paying clients, nor at the rates that have been shown to attract competent, successful counsel in similar cases. Instead, it has held that these attorneys are entitled to recover fees from defendants at the premium hourly rates charged by the leading members of the bar in particularly complex cases -- *Laffey*-matrix rates. It has done so even though the *Laffey* matrix was designed to reflect only what extraordinarily skilled attorneys could command for complex federal litigation; and even though none of the cases here was particularly complex; the successful attorneys here do not purport to be legal luminaries; and counsel here, as well as comparable counsel in similar cases, do not command *Laffey*-matrix rates in the marketplace. The panel majority's decision, although invoking the language of discretion and purporting to assess a proper lodestar award, in fact creates a rule, legislative in nature, and permits contingency enhancements to be awarded in a new guise. It is not supported by accepted evidentiary principles or by the policies underlying federal fee-shifting statutes.

Review by this Court is necessary for several reasons. First, the decision seriously conflicts with the principles established by this Court for awarding attorney's fees under more than 100 federal fee-shifting statutes. Second, the decision wrongly results in across-the-board awards of premium *Laffey*-matrix rates to counsel who have never been able to charge such rates in the marketplace and requires defendants to pay fees higher than those necessary to attract competent counsel to fee-shifting cases. Thus, it wrongly results in windfalls for attorneys; diverts scarce public resources to attorney subsidies; and skews the market for legal services. Third, the decision is in conflict with the decisions of other Circuits. Other Circuits require fee applicants to bear the burden of proof and to adduce specific evidence of the rates actually charged by the prevailing attorneys in the marketplace and of the rates commanded by comparable counsel in similar cases.

I. THE DECISION OF THE PANEL MAJORITY IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A. THIS COURT'S DECISIONS.

In *Blum v. Stenson*, *supra*, this Court set forth two principles that are controlling here. There, this Court explained that, in determining the appropriate hourly rate, or rates, in federal fee-shifting cases:

> . . . courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, *the burden is on the fee applicant to produce satisfactory evidence* -- in addition to the attorney's own affidavits -- that the requested rates are in line with those prevailing in the community *for similar services by lawyers of reasonably comparable skill, experience, and reputation*.

465 U.S. at 896 n.11 (emphasis added). In addition, this Court explained that the term "prevailing market rate" does not refer to a single rate. Instead, it is a term of "convenience" used merely to describe the reasonable hourly rate for a particular attorney's services in a particular case. *Id.* Thus, this Court, reflecting elemental economic theory and experience, recognized that "there is no such thing as a prevailing market rate for the service of lawyers in a particular community." *Id.* at 895 n.11. On the contrary, "[t]he type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively -- even within a law firm," and "[a]ccordingly, the hourly rates of lawyers in private practice also vary widely." *Id.*

Furthermore, this Court in *Dague* rejected contingency enhancements as well as the argument that reasonable attorney's fees may be set on any kind of class-wide basis. It stated that "any approach that applies uniform treatment to the entire class of contingent-fee cases, or to any conceivable subject-matter-based subclass, cannot possibly achieve the supposed goal of mirroring market incentives."

112 S. Ct. at 2642. And it recognized the validity of Judge Williams' observation in what became the D.C. Circuit's dispositive contingency-enhancement case, that any such a class-based approach wrongly results in "'the judicial judgment . . . defining the market, not vice versa.'" *Id.*, quoting *King v. Palmer*, 906 F.2d 762, 770 (D.C. Cir. 1990) (Williams, J., concurring).

B. THE PANEL MAJORITY'S DECISION.

The panel majority's decision is in conflict with *Blum* and *Dague*. It adopts a class-based approach for awarding attorney's fees that cannot possibly reflect the market. Under the decision, there are only two requirements for securing fees at the premium levels contained in the *Laffey* matrix. First, an attorney must demonstrate that his rate in a case is a "reduced" rate. This is now easy to do because a reduced rate is any rate lower than the applicable experience rate in the *Laffey* matrix. Second, an attorney must establish that his rate reflects "non-economic" goals. This is also now easy to do because counsel's self-serving representation that public-spiritedness has caused him to charge rates below the premium rates in the *Laffey* matrix will suffice.[6]

In the cases before this Court, plaintiffs' counsel were awarded hourly rates well above those they have ever been able to command in the marketplace. These awards were based almost exclusively on the *Laffey* matrix, as updated by generalized and self-interested attorney affidavits or by the Consumer Price Index, and by district

---

[6]The only difficulty the panel majority detected in its approach is to distinguish between attorneys who charge below-market rates because they are public-spirited and "attorneys who charge below-market rates because they cannot command anything more." App. 13. This observation highlights a fundamental flaw in the panel majority's decision -- its failure to understand that the rate an attorney can command in the marketplace *is* his market rate and that rates lower than the premium rates charged by leading members of the bar are also market rates if they are set by market forces irrespective of whether an attorney is public-spirited.

court cases adopting the *Laffey* matrix.[7] These awards were made even though the District provided the only specific information about actual rates charged by comparable counsel in similar cases, which were considerably below those in the *Laffey* matrix. Furthermore, prevailing counsel produced no evidence of any other kind -- *e.g.*, that he or she is regarded as a leading expert in the field -- which would justify paying them more than they ever have been able to charge a client.

The original *Laffey* matrix plainly has little probative force. First, as *Blum* recognizes, in flat contradiction to the market, it differentiates among attorneys only on a class-wide basis of blocks of years of experience. Second, it was constructed based on the hourly rates charged by luminaries of the District of Columbia Bar to assist in establishing hourly rates for other luminaries of the Bar in a complex class action. And when a *Laffey* attorney was not a luminary, the district court there, based on the entire record before it, reduced the matrix rate by *one-third*. In addition, in *Laffey*, the district court based its decision, not on the matrix alone, but on the affidavits from which it was derived, which showed what lawyers with comparable qualifications and expertise actually charged their clients. The *Laffey* matrix, therefore, was not intended to establish, and did not establish, prevailing market rates for all members of the District of Columbia Bar.

The updated *Laffey* matrices are no more probative. First, they are based on the original *Laffey* matrix. Second, the methods used to update it were unscientific. The private bar updates were based on anecdotal information supplied by self-interested attorneys, which

---

[7]The panel majority relied on these cases even though the D.C. Circuit previously had ruled, correctly in the District's view, that "fees awarded in other cases are probative of the appropriate community rate only if they were determined based on actual evidence of prevailing market rates, the attorneys involved had similar qualifications, and issues of comparable complexity were raised." *National Ass'n of Concerned Veterans v. Secretary of Defense*, *supra*, 675 F.2d at 1325 n.7.

is entitled to little, or no, weight.[8] The U.S. Attorney's Office updates, in turn, are based on the Consumer Price Index, which does not purport to be a scientific survey of prices for legal services. Third, the rates set forth in these matrices do not reflect the wide range of rates attorneys actually charge in the market or the rates attorneys actually charge for cases like the cases here.[9]

As a consequence, it is apparent that the decision of the panel majority is based on an erroneous and counter-intuitive theory that the fees necessary to attract competent counsel are higher than the fees that in fact have been sufficient to attract counsel -- including the counsel who have prevailed in the very cases for which fees are sought. The panel majority has ruled that hourly rates, payable by clients, which are acceptable to attorneys in non-fee-shifting litigation or in fee-shifting litigation in which they do not prevail, are not acceptable when defendants are paying the bill. Losing defendants

---

[8]*See, e.g., U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 723-25 (1990) ("[t]he impressions" of lawyers contained in affidavits concerning the impact of fee levels on the ability of persons with good claims to secure counsel "are blatantly insufficient to meet [the] . . . burden of proof, even if entirely unrebutted," particularly, where, as there, these affidavits were "small in volume, anecdotal in character, and self-interested in motivation . . .."). The D.C. Circuit sitting *en banc* made a similar point in its dispositive contingency-enhancement case, *King v. Palmer*, *supra*, 950 F.2d at 779 (expressing skepticism about some 70 "obviously self-interested" affidavits submitted in support of a contingency enhancement to lodestar awards and holding that anecdotal evidence from self-interested attorneys cannot be "treated as determinative, or even weighty," in establishing a fee award).

[9]Indeed, plaintiffs' counsel in *Covington* introduced a market rate survey which, even though skewed toward large, commercial firms, underscored that the *Laffey*-matrix rates are premium rates. This survey, from *The National Law Journal*, showed that partner rates in 1990 ranged from $120.00 to $400.00 per hour and that associate rates ranged from $75.00 to $210.00 per hour. J.A. (I)117. The lowest *Laffey*-matrix rates for 1990-91 were $205.00 for partners and $120.00 for associates. J.A. (III)37.

must pay a premium to attorneys who charge rates lower than *Laffey*-matrix rates and who claim to do so for non-economic motivations.

What this means, of course, is that the rates contained in the *Laffey* matrix have become the *floor* for determining "reasonable" hourly rates in fee-shifting cases in the District of Columbia, despite the fact that attorneys are otherwise charging lower, competitive, market-based rates. All plaintiffs' attorneys litigating cases like the ones here, whose rates are below the *Laffey*-matrix rates, will now request and be awarded higher rates based solely on the experience group into which they fall and irrespective of their qualifications and skills (unless, of course, the District, or some other defendant, produces a scientific survey sufficiently persuasive to rebut the non-scientific *Laffey* matrix).

This rule is wrong as a matter of law; defies economic reality; and is not supported by the evidence. First, the rule ignores the broadly divergent marketability and competence of attorneys in the District of Columbia. As *Blum* recognizes, because of market forces -- which take into account factors such as type of services rendered, skill, and reputation -- hourly rates vary widely even for attorneys practicing for *exactly* the same number of years. In addition, it conflicts with *Dague*, which holds that across-the-board enhancements may not be used in setting fees. Fee awards based on the updated *Laffey* matrices, in which courts consider only years of experience and ignore the marketability of individual attorneys, constitute such an enhancement. Indeed, the award of any such "premium rate . . . applicable only when the other side is paying, looks like nothing so much as a disguised multiplier." *Barrow v. Falck*, 977 F.2d 1100, 1105 (7th Cir. 1992) (Easterbrook, J.). *See also Davis v. San Francisco*, 976 F.2d 1536, 1549 (9th Cir. 1992) (*Dague's* "rejection of contingency as a basis for multiplying a lodestar fee similarly dictates that contingency not be a factor in the setting of billing rates."). Finally, because the original *Laffey* matrix was based largely on rates charged by prominent and highly skilled attorneys in the District of Columbia, its use results in costly and unnecessary attorney windfalls.

In short, as *Blum* correctly acknowledged, reasonable hourly rates for attorneys vary widely. Furthermore, the determination of the "reasonable" or "prevailing market" rate for attorneys like those here -- private, for-profit attorneys -- should begin by reference to their established billing rate. While that rate is not, for that reason alone, the reasonable hourly rate, it should be considered highly relevant proof of *their* prevailing community rate. A court must then examine the hourly rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation," *Blum v. Stenson*, *supra*, 465 U.S. at 896 n.11, and, in the exercise of its discretion, set a reasonable hourly rate. There is no single rate that can, or should, be applied to attorneys of a given length of experience.

II. The Panel Majority's Decision Is In Conflict With The Decisions Of Other Circuits.

There have long been conflicts and tensions among the Circuits over how to calculate a reasonable hourly rate in accordance with footnote 11 of *Blum*. Indeed, as long ago as 1987, the Third Circuit, in *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1443-48 (3d Cir. 1988) ("*SPRIG*"), identified four distinct interpretations of that footnote in the context of awarding fees, under federal fee-shifting statutes, to attorneys with for-profit practices:

(1) the billing rate rule, mandating the rate an attorney actually charges clients (citing the panel decision in *SOCM*, 826 F.2d 43 (D.C. Cir. 1987); and *Shakopee Mdewakanton Sioux Community v. Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986));

(2) the micro-market rule, emphasizing rates "public interest" lawyers are able to command in the market and permitting a departure from an attorney's own billing rate only when that rate is out of line with rates charged in the micro-market by attorneys of comparable skill and experience (citing *Lightfoot v. Walker*, 826 F.2d 516, 524 (7th Cir. 1987); *Mayson v. Pierce*, 806 F.2d 1556

(11th Cir. 1987) (*per curiam*); and *Coulter v. Tennessee*, 805 F.2d 146, 148-50 (6th Cir. 1986), *cert. denied*, 482 U.S. 914 (1987));

(3) the modified billing rate rule, applying an attorney's customary billing rate, even if it does not appear to reflect the value of the services rendered, and adding to the lodestar a contingency enhancement (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987)); and

(4) the community market rate rule, applying the rates charged by counsel of comparable skill, experience, and reputation without regard to an attorney's regular billing rates (citing *White v. Richmond*, 713 F.2d 458 (9th Cir. 1983); and *Hall v. Ochs*, 817 F.2d 920, 928-29 (1st Cir. 1987)).[10]

Since *SPRIG*, and despite *Dague's* holding that contingency enhancements may not be awarded, the conflict over the meaning of footnote 11 in *Blum* has continued and intensified. As the following examples demonstrate, the Circuits differ among each other and even internally. Furthermore, although the D.C. Circuit abandoned a strict actual billing rate rule in *SOCM*, the community market rate rule applied in this case is in sharp conflict with the decisions of

---

[10]*See also Webb v. Maldonado*, 484 U.S. 990 (1987) (White, J., dissenting from denial of certiorari) (noting square conflict between the Ninth Circuit in that case and the D.C. Circuit in *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (1984), *cert. denied*, 472 U.S. 1021 (1985); the tension between the Ninth Circuit's approach and that of the Sixth and Seventh Circuits; and the importance of resolving the issue of how a reasonable hourly rate should be calculated in light of the recurring nature of the issue and the fact that there are more than 100 federal fee-shifting statutes authorizing an award of a reasonable attorney's fee to prevailing parties). Although the D.C. Circuit overruled *Laffey* in its *en banc* decision in *SOCM* insofar as *Laffey* held that for-profit attorneys could never recover more than they charged clients, the conflict and tension among the Circuits have not diminished and the importance to the courts and litigants of a definitive resolution of how a reasonable hourly rate should be calculated in light of *Blum* has increased.

other Circuits and with its own earlier decisions interpreting *Blum* and *SOCM*. None of the other Circuits has adopted a rule that permits prevailing for-profit attorneys to recover hourly rates higher than those they have ever been able to charge based on evidence of what other attorneys in a general experience group may charge.

In *Barrow v. Falck, supra*, for example, the Seventh Circuit appeared to move from a micro-market rule to a billing rate rule. It reversed an hourly rate of $135.00, which the district court had awarded based on "an affidavit from a member of the local bar that . . . the market rate for attorneys possessing the 'experience, qualifications, reputation and ability' of plaintiff's lawyer is $135 per hour in civil rights cases." 977 F.2d at 1104-05. The district court had done so even though plaintiff's lawyer had revealed that his client, a labor union, had paid him between $80.00 and $110.00 for his work in that case and "that this was the rate he regularly charged for his own services, and that he had never in his life received a fee exceeding $120 per hour." *Id.* at 1105. In reversing, Judge Easterbrook, writing for the court, explained:

> Perhaps *other* attorneys . . . have market rates in the range of $135; rates vary with skill and the time a lawyer needs to accomplish a task. But *this* attorney had a market rate of $110 or less. "[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order." . . .
>
> At oral argument counsel suggested that the fee he negotiated with the union was too low and that the full agreement called for $80-$110 with certainty plus gravy if he won and could persuade the judge to award more. So stated, the arrangement is a form of contingent fee -- a bonus for winning. . . . [H]owever, the Supreme Court [has] held that risk multipliers are forbidden under . . . fee-shifting statutes . . ..

> . . . Judges must stick to the market rate for the attorneys' time -- that is to say, the opportunity costs of their time, the rate they could receive in other engagements. Unless there is evidence that attorneys receive more per hour, from their own clients, in civil rights litigation than in other kinds of litigation . . . the court must use the hourly rate for the attorney's regular legal services.

977 F.2d at 1105 (emphasis in original).[11]

On remand, the district court again awarded an hourly rate of $135.00, based upon new evidence that counsel previously had been awarded this hourly rate in an action against the same defendant. Once again the Seventh Circuit reversed. *Barrow v. Falck*, 11 F.3d 729 (7th Cir. 1993). In reversing, the court noted, *inter alia*, that "[m]arket prices may go down as well as up; many lawyers have reduced their rates during the recent period of soft demand for legal services" and thus the earlier fee award "could not have resolved" the attorney's "market rate for the indefinite future." *Id.* at 731. The court also noted that the earlier award had been made at the time when "many judges believed it was appropriate to award" an enhancement in cases taken on a contingent-fee basis, a belief rendered erroneous by *Dague*, and the fact that a "judge made the same mistake in an earlier case does not justify repetition." *Id.* at 731 & 732. Finally, the court again turned to the determination of an appropriate hourly rate. It noted that, on remand, plaintiff's counsel had not introduced evidence concerning what portions of his business was at the various rates he charged but "instead offered a flurry of affidavits about what other lawyers charge for their work or hope to receive when courts set the rate." *Id.* at 732. The court was not impressed because this lawyer had his own paying business.

---

[11]In *Barrow*, the Seventh Circuit specifically addressed the D.C. Circuit's *en banc* decision in *SOCM*, but, in contrast to the panel majority here, interpreted *SOCM* as "hold[ing] that the market rate of legal time is the opportunity cost of that time, the income foregone by representing this plaintiff." *Id.* at 1105.

It therefore awarded $95.00 per hour, the midpoint between his own stated lowest and highest rates.[12]

By contrast, the Tenth Circuit has adopted the micro-market approach. Thus, in *Beard v. Teska*, 31 F.3d 942 (10th Cir. 1994), the court, in an opinion written by the Honorable Milton I. Shadur sitting by designation, awarded fees at a rate *less* than that customarily charged by plaintiff's counsel to his clients because the rate requested exceeded the rate charged by competent counsel doing the same sort of work. *Beard* was a case in which counsel, "with a deservedly high reputation in civil rights litigation," brought his first case under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* *Id.* at 957. The evidence was that plaintiff's counsel regularly charged $200.00 per hour for his services and that he had been awarded this rate by courts in civil rights cases, but that local IDEA specialists charged between $90.00 and $140.00 per hour and that the most frequently charged hourly rate both locally and nationally by IDEA specialists was $125.00. The court approved an hourly rate of $125.00. It explained that "[t]here are of course different markets for different areas of lawyer's work," and that the hourly rates of attorneys specializing in house closings are less than those charged by corporate merger

---

[12]*See also Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993) (remanding to district court for reconsideration of an hourly rate less than that attorneys commanded in the relevant geographic market which had been set by reference to the rates customarily charged by comparable counsel in the market and noting that "[o]ur recent cases have stressed that the best measure of the cost of an attorney's time is what that attorney could earn from paying clients"); *Casey v. Cabool, Missouri*, 12 F.3d 799, 805 (8th Cir. 1993) ("opportunity cost" is "the starting point for determining a presumptively correct hourly rate"), *cert. denied*, 115 S. Ct. 325 (1994). *Compare Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 179 (4th Cir. 1994) (ruling that district court should have awarded to out-of-state firm its customary rates even though they were higher than the rates charged by local firms but also ruling that district court did not abuse its discretion in reducing customary rates of local firm based on "his own personal knowledge of the prevailing rates" in the area).

specialists, even though both may be handling real estate acquisitions. *Id.* at 956. Purchasers of a home are, of course, free to hire a merger specialist to handle their house closing, "[b]ut if and when it comes down to fee shifting -- to imposing on the other side an obligation to pay the lawyer's fee . . . -- the higher cost of the merger specialist cannot properly be thrust on someone who did not, after all, make the uneconomic choice of counsel." *Id.*

The Ninth Circuit, in turn, seems to have moved from a community market rate rule to a micro-market rule.[13] *In Davis v. San Francisco, supra*, a complex Title VII class action, the court ruled that the district court had not abused its discretion in awarding rates higher than those charged by plaintiff's counsel based on rates charged by other attorneys engaged in complex Title VII class actions. It also ruled that the city did not overcome this evidence when "*[t]he only evidence it presented concerning billing rates was a survey done of the California legal market as a whole which discussed a wide variety of practice areas.*" 976 F.2d at 1547 (emphasis added).

Still other approaches have been followed by the Second and Fifth Circuits. In *Chambless v. Masters, Mates & Pilots Pension Plan*, 885 F.2d 1053 (2d Cir. 1989), *cert. denied*, 496 U.S. 905 (1990), the district court awarded plaintiff's counsel, a small firm, rates set by reference to its personal knowledge of the rates charged by small and medium firms and rejected plaintiff's argument that he was entitled to fee parity with the large firm that had represented the

---

[13]The Third Circuit in *SPRIG* cited the Ninth Circuit's decision in *White v. Richmond, supra*, as adopting the community market rate rule. In *White*, the court rejected the city's complaint that the fee award should be reversed because "prevailing counsel were not required to submit evidence of *their own actual* billing rates." 713 F.2d at 461 (emphasis in original). In rejecting this argument, the court ruled that a trial court may consider evidence of an attorney's customary billing rate but does not abuse its discretion in awarding a higher rate on the grounds that "many civil rights practitioners do not bill their clients at an hourly commercial rate." *Id.*

defendant. The Second Circuit affirmed, ruling that the district court had not abused its discretion in relying on his personal knowledge; that even a legal newspaper article plaintiff had introduced had stated that it was "'trickier'" for small and medium firms to raise rates; and that the rates charged by defense counsel were "'irrelevant.'" *Id.* at 1059.

In *Islamic Center of Mississippi, Inc. v. Starkville, Mississippi*, 876 F.2d 465 (5th Cir. 1989), in turn, the Fifth Circuit remanded a fee award based on hourly rates ($65.00 and $100.00) lower than the rates customarily charged by plaintiff's counsel ($90.00 and $120.00) which were within the "customary range" ($65.00 to $150.00) in the relevant community for "complex civil-rights litigation in federal court . . .." *Id.* at 469, 467. The court did so because the district court gave no reason for its reduction "although the[] rates [requested] concededly fall squarely within the range of prevailing market rates." *Id.* at 469-70.

Even within the D.C. Circuit, there is a conflict over how to determine a reasonable hourly rate. Thus, in *Goos v. National Ass'n of Realtors*, *supra*, the court, adopting an approach similar to that adopted in *Islamic Center*, held that the fact that an attorney's hourly rate is below the *Laffey*-matrix rate is not sufficient, by itself, to prove that it is "below market," and it upheld a fee award based on hourly rates well below those contained in the matrix because those rates were the attorney's customary rates and he had averred that those rates were in line with rates charged by comparable attorneys in comparable cases. 997 F.2d at 1568-69. And, in *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994), the D.C. Circuit, adopting a blended micro-market/community rate approach, upheld an hourly rate of $125.00, the rate charged by experienced lawyers in similar cases, to an attorney who had been charging $150.00 per hour, and stated that "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Id.* at 278, *quoting Blum v. Stenson*, *supra*, 465 U.S. at 895-96 n.11.

In short, the Circuits continue to employ a variety of conflicting approaches to determine the meaning of this Court's prevailing market rate concept in *Blum* and the nature of the proof required of fee applicants to discharge their burden of proof. The panel majority's decision here squarely conflicts with the decisions of the other Circuits on both of these points as well as with previous decisions of the D.C. Circuit.

CONCLUSION

This case raises an important and constantly recurring issue that has been wrongly decided by the D.C. Circuit and that should be resolved by this Court. This Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

CHARLES F.C. RUFF
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

DONNA M. MURASKY*
Assistant Corporation Counsel

Office of the Corporation Counsel
One Judiciary Square -- 6th Floor South
441 Fourth Street, N.W.
Washington, D.C. 20001
Telephone: (202) 727-6252 ext. 3303

**Counsel of Record*